dealing in liquor, a subject over which Congress has had no power since the repeal of the Eighteenth Amendment."

2. In holding that Section 701 imposes not an excise tax but a penalty dealing with a subject left or committed by the Constitution to the control of the States.

3. In reversing the judgment of the District Court.

ARGUMENT

All of the arguments pertinent to the issues in this case are fully set forth in the Government's brief in the case of *The United States of America* v. *Gus L. Constantine, alias Dr. Gus,* No. 40, which is to be argued immediately preceding the instant case. It is unnecessary to do more, therefore, than summarize the pertinent arguments, reference being made for a more complete discussion of the various arguments to the brief in the *Constantine case.*

Section 701 does not impose a penalty as to "a subject over which Congress has had no power since the repeal of the Eighteenth Amendment." The statute in question rests upon the power of Congress under Article I, Section 8, Clause 1, of the Constitution to "lay and collect Taxes, Duties, Imposts, and Excises * * *". It has never been dependent upon the Eighteenth Amendment for its constitutional basis. The section had its origin in sub-section 12 of Section 1001 of the Revenue Act

of 1918. It was therefore enacted prior to the effective date of the Eighteenth Amendment and the passage of the National Prohibition Act, and there is nothing in its history to indicate that it was part of the enforcement machinery of the Eighteenth Amendment or that it was enacted as an aid to national prohibition. It is denominated in the Revenue Act of 1918 a "special excise tax". Its legislative history shows that it was enacted primarily as a revenue measure, and it has consistently been treated as a tax by the Treasury Department with the exception of the period during which national prohibition was in effect, when the basic tax imposed by the section was doubled, upon evidence of manufacture and sale contrary to Federal law, by virtue of Section 35, Title II, of the National Prohibition Act, and thus became a penalty. Congress from early times has imposed excise taxes upon the business of dealing in liquor. *License Tax Cases*, 5 Wall. 462. The section in question differs from these admittedly valid measures in that it imposes a special tax only upon illicit liquor dealers, thus placing them in a separate category for tax purposes. Having in mind the greater revenue derived from illicit liquor businesses and the greater expense to which the Government is put in the collection of taxes from such businesses, it is submitted that Congress has the power to impose heavier taxes upon such businesses and that to do so does not constitute the levy a penalty.

Subject to the requirement of geographical uniformity, Congress may select the subjects of taxation. *United States* v. *Doremus*, 249 U. S. 86. The fact that other motives in addition to the raising of revenue may impel the exercise of the Federal taxing power does not authorize the courts to inquire into that subject. *Veazie Bank* v. *Fenno*, 8 Wall. 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107. Section 701 is primarily a revenue measure, whatever the incidental purpose behind its enactment may have been.

The statute does not deal with a subject left or committed to the exclusive control of the States under the Tenth Amendment. Unlike the attempts to use the taxing power to dictate and regulate matters of local concern which were declared invalid in the *Child Labor Tax Case*, 259 U. S. 20, and *Hill* v. *Wallace*, 259 U. S. 44, the section in question is so framed as to give recognition to the announced policies of the States, and as drafted it constitutes a recognition, not an invasion, of State powers. *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311.

Furthermore, the statute meets the requirement of uniformity imposed by Article I, Section 8, Clause 1, of the Constitution, since it deals equally with the subject of the tax wherever it be found. *Head Money Cases*, 112 U. S. 580, and other decisions cited in the Government's brief in the *Constantine case*. The subjects of the tax are unlawfully operated liquor businesses, and the tax is

levied equally upon such businesses wherever they are found.

CONCLUSION

For the reasons stated, we respectfully submit that Section 701 of the Revenue Act of 1926 did not fall with the repeal of the Eighteenth Amendment; that it imposes a true tax and not a penalty; that it does not infringe upon the reserved powers of the States; that it meets the constitutional requirement of uniformity; and that it consequently was within the power of Congress to enact. The judgment of the Circuit Court of Appeals should therefore be reversed and the judgment of the District Court affirmed.

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